

## CCRB INVESTIGATIVE RECOMMENDATION

Investigator: Raquel Velasquez	Team: Squad #11	CCRB Case #: 201506161	<input checked="" type="checkbox"/> Force	<input type="checkbox"/> Discourt.	<input type="checkbox"/> U.S.
			<input checked="" type="checkbox"/> Abuse	<input type="checkbox"/> O.L.	<input checked="" type="checkbox"/> Injury
Incident Date(s) Saturday, 07/18/2015 6:00 AM	Location of Incident: 40th Precinct stationhouse	Precinct: 40	18 Mo. SOL 1/18/2017	EO SOL 1/18/2017	
Date/Time CV Reported Sat, 07/18/2015 12:30 PM	CV Reported At: IAB	How CV Reported: Phone	Date/Time Received at CCRB Mon, 07/27/2015 11:44 AM		

Complainant/Victim	Type	Home Address

Witness(es)	Home Address

Subject Officer(s)	Shield	TaxID	Command
1. POM Ernesto Bautista	28399	953671	PBBX
2. POM Francisco Diodonet	31860	936497	040 PCT
3. POM Ruben Guerrero	12555	953935	040 PCT

Officer(s)	Allegation	Investigator Recommendation
A.POM Ernesto Bautista	Force: PO Ernesto Bautista used a chokehold against § 87(2)(b)	
B.POM Ernesto Bautista	Force: PO Ernesto Bautista restricted § 87(2)(b)'s breathing.	
C.POM Ernesto Bautista	Force: PO Ernesto Bautista used physical force against § 87(2)(b)	
D.POM Ruben Guerrero	Abuse: PO Ruben Guerrero did not process § 87(2)(b)'s complaint regarding an officer.	
E.POM Francisco Diodonet	Abuse: PO Francisco Diodonet did not obtain medical treatment for § 87(2)(b)	

### Case Summary

On July 18, 2015, at approximately 12:43 a.m., § 87(2)(b) was arrested pursuant to being issued a summons for tinted windows, the discovery that § 87(2)(b) had an open I-card, and during a search incident to arrest, crack cocaine was recovered from his waistband and 10.31 ounces of marijuana were found in his vehicle (**Board Review 11**). PO Ernesto Bautista, from the 40<sup>th</sup> Precinct was called to the scene and assigned the arrest. § 87(2)(b) was transported to the 40<sup>th</sup> Precinct stationhouse and was placed in a holding cell. At approximately 6:00 a.m., while § 87(2)(b) made a phone call, PO Bautista used a chokehold on § 87(2)(b) restricted his breathing, and used physical force against him (**Allegations A, B, and C**). § 87(2)(b) spoke with PO Ruben Guerrero, from the 40<sup>th</sup> Precinct, and stated that he wanted to file a complaint against PO Bautista; PO Guerrero did not process § 87(2)(b)'s complaint (**Allegation D**). PO Francisco Diodonet, also from the 40<sup>th</sup> Precinct, escorted § 87(2)(b) to Bronx Central Booking. PO Diodonet refused to provide medical attention to § 87(2)(b) (**Allegation E**).

This case is being submitted after the 90-day benchmark because police documents necessary to identify the witnesses in the holding cell took approximately one month to arrive and because officers did not appear to their CCRB interviews as scheduled since they were not notified, delaying the investigation another month. Additionally, upon review of the first closing report draft, additional steps were required, following an APU consultation.

There is no video recording of this incident.

### Mediation, Civil and Criminal Histories

- This case was not suitable for mediation.
- § 87(2)(b) did not file a Notice of Claim regarding this incident (**Board Review 1**).
- Regarding his arrest for this case, § 87(2)(b) pled guilty to disorderly conduct and received a conditional discharge and community service for 3 days. § 87(2)(b) (Board Review 2).

### Civilian and Officer CCRB Histories

- This is § 87(2)(b)'s first CCRB complaint (**Board Review 3**).
- PO Ernesto Bautista has been a member of the service for 2 years and there are no substantiated CCRB allegations against him. This is PO Bautista's first CCRB case.
- PO Ruben Guerrero has been a member of the service for two years and there are no substantiated CCRB allegations against him.
- PO Francisco Diodonet has been a member of the service for 10 years and there are no substantiated CCRB allegations against him.

### Findings and Recommendations

**Allegation A: Force- PO Ernesto Bautista used a chokehold against § 87(2)(b)**

**Allegation B: Force- PO Ernesto Bautista restricted § 87(2)(b)'s breathing.**

**Allegation C: Force- PO Ernesto Bautista used physical force against § 87(2)(b)**

It is undisputed that while § 87(2)(b) was making a phone call outside of the holding cell, he and PO Bautista argued and PO Bautista hung up on the call, and they continued to argue.

§ 87(2)(b) stated that when PO Bautista told him to go back to the holding cell, § 87(2)(b) said he would not move until he spoke with a supervisor. PO Bautista wrapped his right hand across the front of § 87(2)(b)'s neck, pushed him against the gated window directly behind § 87(2)(b) and squeezed § 87(2)(b)'s neck. With his left hand, PO Bautista allegedly pushed

into § 87(2)(b)'s left rib area. § 87(2)(b) placed his hands up in a surrendering motion and told PO Bautista, "I can't breathe. Get off of me." PO Bautista did not respond. Approximately one minute passed and PO Bautista did not let go of § 87(2)(b)'s neck, so § 87(2)(b) grabbed PO Bautista's right arm with both hands and pushed PO Bautista's arm down. PO Bautista allegedly grabbed § 87(2)(b)'s right shoulder and pushed him forward towards a table next to the wall phone. § 87(2)(b) placed his hands in front of his body to block his face from hitting against the table. § 87(2)(b) attempted to push his body up, but PO Bautista then placed § 87(2)(b) in a headlock by wrapping his right arm around § 87(2)(b)'s head, covering his mouth, and squeezed his ears. § 87(2)(b) could not breathe, so he continued to push his body upward. As § 87(2)(b) did this, PO Bautista's right arm fell and allegedly wrapped around § 87(2)(b)'s neck. § 87(2)(b)'s hands were on his sides and he pushed his body forward as PO Bautista pulled him back. The prisoners in the holding cell, identified via the investigation as § 87(2)(b) and § 87(2)(b) yelled, "Get off of him. He's choking him." § 87(2)(b) denied knowing § 87(2)(b) or § 87(2)(b).

Approximately ten uniformed officers, including PO Ruben Guerrero, ran into the holding cell. § 87(2)(b) immediately raised his hands and said, "Get him off of me. He's choking me and I'm not resisting." PO Bautista replied, "I wasn't choking him. I was just giving him a hug." The officers told PO Bautista to let go of § 87(2)(b). PO Bautista complied. PO Guerrero and other officers escorted § 87(2)(b) to the front of the holding cell. Two minutes later, PO Bautista allegedly ran towards § 87(2)(b) and pushed him head first into the bars of the male holding cell. PO Guerrero told PO Bautista, "Let go of him. I got this." PO Bautista complied and officers removed PO Bautista from the holding cell area. § 87(2)(b) did not see PO Bautista thereafter **(Board Review 4)**.

§ 87(2)(b) was treated at § 87(2)(b) for neck and back pain, and a small bruise on his back, which he sustained when his back struck the gated window. § 87(2)(b) told medical personnel that he was beaten up/ assaulted/had an altercation with the police and complained of neck and back pain. § 87(2)(b) said that he had a history of neck and back pain dating back to 2013. § 87(2)(b)'s medical records show that there were no obvious signs of injury or trauma noted, but muscle spasms in his lower back were noted. § 87(2)(b) was diagnosed with lower back pain and spasm of muscle in the lower back. He was given Toradol (see **Medical Records**). § 87(2)(b)'s arrest photograph does not depict any visible injuries **(Board Review 17)**.

§ 87(2)(b) and § 87(2)(b) two of the prisoners in the holding cell who were identified via police documents, provided the statements below.

§ 87(2)(b) identified § 87(2)(b) by his street name, "§ 87(2)(b)" which he knew because § 87(2)(b) lives in § 87(2)(b)'s father's neighborhood. § 87(2)(b) stated that when § 87(2)(b) and PO Bautista argued after the call ended, PO Bautista placed one hand on the front of § 87(2)(b)'s throat and held him against the window. PO Bautista told § 87(2)(b) "Oh, you think that you're tough?" § 87(2)(b) attempted to pull away from PO Bautista and § 87(2)(b) had his hands up while PO Bautista tried to place § 87(2)(b) in a headlock. § 87(2)(b) and § 87(2)(b) yelled to get the attention of other officers and approximately nine officers entered the holding cell area. The officers approached and separated PO Bautista and § 87(2)(b). § 87(2)(b) was scheduled twice for a verified interview, but he did not appear for either interview dates. He also failed to appear to a scheduled meeting with the Field Team to sign a verification form **(Board Review 5)**.

§ 87(2)(b) stated that after the call ended and § 87(2)(b) and PO Bautista argued, PO Bautista was pissed off and grabbed § 87(2)(b) by the throat. PO Bautista's hand was on § 87(2)(b)'s neck and chest area and he pushed § 87(2)(b) back against the wall. PO Bautista then placed his forearm on § 87(2)(b)'s upper chest and held him against the wall. § 87(2)(b) looked away as soon as PO Bautista made contact with § 87(2)(b) because he did not want to be involved. Three to four officers showed up approximately 30 seconds to a minute later. § 87(2)(b) did not see what happened during that time, but heard struggle of being pushed back and standing there. § 87(2)(b) assumed that, during that time, § 87(2)(b) could not speak because he was pushed against the wall with a forearm across chest/neck area. § 87(2)(b) looked up when the other officers came and saw PO Bautista remove his forearm from § 87(2)(b)'s upper chest. § 87(2)(b) said, "This guy put his hand on me" and that PO Bautista pushed him up against the wall for no reason. The officers placed § 87(2)(b) back in the cell approximately a minute later. § 87(2)(b) later repeatedly complained that PO Bautista pushed him across his neck. § 87(2)(b) did not see this (**Board Review 6, 27, & 28**).

PO Bautista stated that when he hung up the call on § 87(2)(b) that § 87(2)(b) clenched both fists, while still holding onto the phone with his right hand, and cursed at PO Bautista, "Fuck you. You're a fucking asshole." PO Bautista asked § 87(2)(b) for the phone and reached towards the phone; § 87(2)(b) flailed his arm. PO Bautista told § 87(2)(b) at least three more times to give him the phone; § 87(2)(b) said, "No, fuck you." PO Bautista told § 87(2)(b) "Come on. Stop. Let's do things the right way. I don't want this to get physical. Let me just get the phone." § 87(2)(b) repeated, "Fuck you." PO Bautista noticed § 87(2)(b) was clenching to the phone pretty firmly to the point where the veins on his right arm popped out and thought that § 87(2)(b) might hit him with it if he did not take it away. PO Bautista aimed to grab phone, but § 87(2)(b) swung his right arm away. PO Bautista stated that he is a "much bigger guy" than § 87(2)(b) and he did not want anything wrong to happen so he grabbed onto § 87(2)(b)'s right wrist with his left hand and they were face to face, approximately a foot apart. PO Bautista wanted to bring § 87(2)(b) towards him so that they he could have control of § 87(2)(b) and stop any further struggle. § 87(2)(b) became combative by moving around and pushing PO Bautista repeatedly in his shoulder, forearm and wrist with his left hand. PO Bautista was still holding onto § 87(2)(b)'s arm because he was not letting go of the phone and grabbed § 87(2)(b)'s left wrist with his right hand. PO Bautista lost control of one of § 87(2)(b)'s wrists and § 87(2)(b) pushed PO Bautista.

PO Guerrero rushed into the holding cell area and approached them. § 87(2)(b) had dropped the phone. PO Guerrero grabbed § 87(2)(b)'s right forearm and wrist, while PO Bautista grabbed § 87(2)(b)'s left forearm and wrist and together they brought § 87(2)(b) next to the cells and placed him up against the wall. PO Guerrero, who is much bigger than PO Bautista and § 87(2)(b) had § 87(2)(b) under control and told PO Bautista to leave in order to diffuse the situation. PO Bautista stood on the side and recalled § 87(2)(b) saying, "Oh my God, get him away from me. Get him away from me. I don't want to be around him," referring to PO Bautista. § 87(2)(b) asked PO Bautista why he had choked him and acted fearful. PO Bautista became upset over the change in § 87(2)(b)'s demeanor, because, during the entire arrest time, § 87(2)(b) acted very tough and not fearful. PO Bautista believed § 87(2)(b) was just acting because he had already stated that he was going to sue the officers. PO Bautista stepped out of the holding cell area and saw PO Guerrero place § 87(2)(b) in the holding cell. PO Bautista then went upstairs and did not interact with § 87(2)(b) thereafter. No other officer approached or got involved in the struggle.

PO Bautista denied placing his hand on or around § 87(2)(b)'s neck. PO Bautista denied squeezing § 87(2)(b)'s neck or pushing into § 87(2)(b)'s ribs. PO Bautista denied pushing

§ 87(2)(b) towards any of the gated windows, towards the table, or against the cells. PO Bautista denied placing § 87(2)(b) in a headlock or placing his arm around § 87(2)(b)'s head or neck. PO Bautista denied restricting § 87(2)(b)'s breathing. § 87(2)(b) did not say that he could not breathe. PO Bautista provided a photograph of his wrist which depicts a scratch he sustained during the struggle with § 87(2)(b) (**Board Review 8**). PO Bautista took this photograph after § 87(2)(b) said he was going sue PO Bautista. PO Bautista wanted to show that § 87(2)(b) did not have any injuries while PO Bautista did sustain an injury. PO Bautista did not seek medical treatment (**Board Review 7**).

In his memo book, PO Bautista noted that at 6:00 a.m., he gave § 87(2)(b) a phone call and § 87(2)(b) began to be rude and disrespectful. PO Bautista went to end the call and asked for the phone, but § 87(2)(b) would not let go. PO Bautista repeatedly asked § 87(2)(b) for the phone; § 87(2)(b) refused to let go of the phone. At that point, PO Bautista noticed that § 87(2)(b) was holding onto the phone really tightly and thought that § 87(2)(b) was going to use the phone as a weapon because he was upset he was arrested. PO Bautista went to grab the phone and § 87(2)(b) flailed his arms and put up a struggle. PO Bautista noted, "At no point did I choke him." § 87(2)(b) then started to act fearful and say that PO Bautista choked him. (**Board Review 18**) § 87(2)(b)'s Prisoner Pedigree Card notes § 87(2)(b)'s physical/mental condition as normal. The document notes that medical attention was not requested and that § 87(2)(b) refused medical attention (**Board Review 19**).

PO Guerrero stated that he was going down the stairs when he heard two loud voices coming from the holding cell, yelling back and forth. PO Guerrero immediately went to the holding cell area to make sure everything was okay. PO Guerrero saw PO Bautista and § 87(2)(b) standing next to the wall phone and the table. § 87(2)(b) had the phone gripped tightly in his hand and his arm was folded up, almost at shoulder length, in a way that looked like he was going to hit PO Bautista. Using one hand, PO Bautista immediately grabbed § 87(2)(b)'s forearm. § 87(2)(b) was upset and said, "I want to use the phone." PO Guerrero immediately approached them and grabbed § 87(2)(b)'s other arm to prevent a struggle. PO Guerrero and PO Bautista walked § 87(2)(b) across the room and placed him up against a wall next to the cells. § 87(2)(b) was compliant. PO Guerrero had a good rapport with § 87(2)(b) and he wanted to de-escalate the situation, so he told PO Bautista to step out and that he would speak with § 87(2)(b). PO Bautista agreed and left. PO Guerrero did not use any other force against § 87(2)(b). There were no other officers present during the altercation. § 87(2)(b) told PO Guerrero that he was upset because he wanted to make another phone call and PO Bautista would not allow it. PO Guerrero told § 87(2)(b) to calm down and relax and that he'd let him make another phone call later. PO Guerrero placed § 87(2)(b) in the cell; § 87(2)(b) was compliant. PO Guerrero left and did not see § 87(2)(b) thereafter. PO Guerrero did not see PO Bautista place his hand on § 87(2)(b)'s neck, squeeze § 87(2)(b)'s neck or push into § 87(2)(b)'s ribs. PO Guerrero did not see PO Bautista push § 87(2)(b) against the gated windows, the table, or the holding cells. PO Guerrero did not see PO Bautista place § 87(2)(b) in a headlock or see PO Bautista place his arm around § 87(2)(b)'s neck or mouth. § 87(2)(b) did not make any statements to PO Guerrero regarding any force that PO Bautista used against him. § 87(2)(b) did not say, "I think he's trying to kill me. Get him off me, he's choking me." (**Board Review 9**)

PO Mojicabarry and PO Horne, two of the female officers on duty, denied being present during the incident. PO Mojicabarry stated, and her memo book shows, that she was out on patrol attending a call when the incident occurred (**Board Review 22 and 24**). PO Horne's memo book also indicates that she returned to the stationhouse after the incident occurred (**Board Review 21 and 25**).

Patrol Guide Procedure 203-11 states that officers must use a minimal amount of force when effecting an arrest. Furthermore, the use of chokeholds, the definition of which includes but is not limited to any pressure to the throat or windpipe which may prevent or hinder breathing, or reduce air intake, is prohibited **(Board Review 12)**.

§ 87(2)(b) stated that PO Bautista's use of force was unprovoked as he immediately choked him, pushed him against the wall, and pushed him head first against the bars of the holding cell. § 87(2)(b) told medical personnel that he was struck against a gated window and had neck and back pain as a result. PO Bautista acknowledged that a struggle ensued between him and § 87(2)(b) and that he used some force to overcome § 87(2)(b)'s resistance, but he denied all of the allegations. PO Guerrero denied observing any struggle between PO Bautista and § 87(2)(b) and denied all of the allegations. § 87(2)(g)

§ 87(2)(g)

**Allegation D: Abuse of Authority- PO Ruben Guerrero did not process § 87(2)(b)**  
**§ 87(2)(b)'s complaint regarding an officer.**

§ 87(2)(b) stated that, after PO Bautista was removed from the holding cell area, he and PO Guerrero spoke about what had occurred. § 87(2)(b) asked PO Guerrero for PO Bautista's badge number and asked to speak with a supervisor because he wanted to file a complaint against PO Bautista. PO Guerrero told § 87(2)(b) to calm down, offered to let him make a phone call, and told him that there was no captain on duty (**Board Review 4**).

§ 87(2)(b) corroborated that, following the incident, § 87(2)(b) stated that he was going to file a report against PO Bautista and sue him (**Board Review 6, 27 & 28**).

PO Guerrero acknowledged speaking with § 87(2)(b) telling him to calm down and that he would allow him to make another phone call later, but he denied that he stated he wanted to file a complaint against PO Bautista (**Board Review 23**).

Patrol Guide Procedure 207-31 states that a civilian may file a complaint against an officer at any stationhouse or office of the NYPD and that officers are required to process these complaints **(Board Review 20)**.

§ 87(2)(g)

**Allegation E: Abuse of Authority- PO Francisco Diodonet did not obtain medical treatment for § 87(2)(b)**

§ 87(2)(b) stated that, at approximately 10:00 a.m., PO Diodonet came into the holding cell and told § 87(2)(b) that he was going to transport him to Bronx Central Booking. § 87(2)(b) told PO Diodonet that he wanted to go to the hospital. PO Diodonet told § 87(2)(b) that he was only assigned to transport him to Bronx Central Booking and told § 87(2)(b) that he could ask for medical attention there. At Bronx Central Booking, § 87(2)(b) requested medical attention and he was transported to § 87(2)(b) **(Board Review 4)**. The Pre-Arrestment Screening Form prepared for § 87(2)(b) notes that § 87(2)(b) was not and did not appear sick or injured. The portion of the form that notes whether a prisoner was transported to the hospital is blank **(See Medical Records)**.

§ 87(2)(b) corroborated that § 87(2)(b) asked PO Diodonet for medical treatment before being transported to Bronx Central Booking, but stated that § 87(2)(b) was not transported with him to Bronx Central Booking **(Board Review 5)**. § 87(2)(b) also corroborated that, before being transported to Bronx Central Booking, § 87(2)(b) asked the transporting officer for medical attention. § 87(2)(b) did not see which officer because he was not paying attention, but one of them told § 87(2)(b) that someone would check him at Bronx Central Booking. § 87(2)(b) corroborated that he and § 87(2)(b) were transported to Bronx Central Booking together and that there, § 87(2)(b) re-requested medical attention **(Board Review 6, 27 & 28)**.

PO Bautista and PO Guerrero did not hear § 87(2)(b) ask any officer for medical attention **(Board Review 7 and 9)**.

PO Diodonet did not recall this incident although it is noted in his memo book that he did a transport to Bronx Central Booking and that he transported § 87(2)(b) to § 87(2)(b). PO Diodonet was shown a photograph of § 87(2)(b) but he did not recognize him as being the individual he transported. PO Diodonet stated that he received a radio call instructing him to return to the stationhouse for a transport. At the stationhouse, PO Diodonet was instructed by an officer that he did not recall to transport § 87(2)(b) to Bronx Central Booking. PO Diodonet transported § 87(2)(b) to Bronx Central Booking without incident. § 87(2)(b) did not complain of any injuries or pain and he did not tell PO Diodonet that he wanted to go to the hospital. PO Diodonet did not recall if § 87(2)(b) told him at Bronx Central Booking that he wanted to go to the hospital and he did not know what happened while at Bronx Central Booking, but he was instructed to transport § 87(2)(b) to § 87(2)(b) **(Board Review 10)**.

The 40<sup>th</sup> Precinct Prisoner Holding Pen Roster and Command Log corroborate that § 87(2)(b) and § 87(2)(b) were transported to Bronx Central Booking in vehicle #8593 at approximately 8:50 a.m. **(Board Review 13 and 14)** § 87(2)(b)'s arraignment documents note that § 87(2)(b) was brought into the Bronx Central Booking intake room at approximately 9:16

a.m. At approximately 10:40 a.m., § 87(2)(b) was escorted by PO Diodonet to the § 87(2)(b) Emergency Room (**Board Review 15**).

Patrol Guide Procedure 210-04 states that an officer is required to provide medical attention to individuals in police custody. It notes that an officer must request an ambulance for the prisoner and accompany the prisoner to the hospital (**Board Review 16**).

§ 87(2)(g)  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

---

Squad: **11**

Investigator: \_\_\_\_\_  
Signature Print Date

Pod Leader: \_\_\_\_\_  
Title/Signature Print Date

Attorney: \_\_\_\_\_  
Title/Signature Print Date